



July 12, 2013

**VIA EMAIL**

British Columbia Securities Commission  
Alberta Securities Commission  
Financial and Consumer Affairs Authority of Saskatchewan  
Manitoba Securities Commission  
Ontario Securities Commission  
Autorité des marchés financiers  
Superintendent of Securities, Prince Edward Island  
Nova Scotia Securities Commission  
New Brunswick Securities Commission  
Securities Commission of Newfoundland and Labrador  
Superintendent of Securities, Northwest Territories  
Superintendent of Securities, Yukon Territory  
Superintendent of Securities, Nunavut

c/o: Ms. Anne-Marie Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
[consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

The Secretary  
Ontario Securities Commission  
[comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

Dear Sir/Madam:

**RE: Canadian Securities Administrators (“CSA”) Proposed National Instrument 62-105 *Security Holder Rights Plan*; Proposed Companion Policy 62-105CP *Security Holder Rights Plans* (“the CSA Proposal”) and the Autorité des marchés financiers (“AMF”) Consultation Paper *An Alternative Approach to Securities Regulators’ Intervention in Defensive Tactics* (“the AMF Proposal”)**

British Columbia Investment Management Corporation (bcIMC) is submitting this reply to the request for comments published on March 14, 2013 on the proposed National Instrument 62-105, Companion Policy 62-105, and proposed consequential amendments (the “Security Holder Rights Plans Proposal”).

bcIMC is one of the largest Canadian institutional investors and manages a C\$100 billion portfolio of globally diversified investments on behalf of the public sector pension plans of British Columbia and publicly-administered trust funds, as well as other public sector bodies. An important portion

of bclMC's overall portfolio is invested in the public markets, which explains our interest in commenting on the Security Holder Rights Plans Proposal.

We should also note that bclMC is a member of the Canadian Coalition for Good Governance (CCGG). We support the submission of that organization but also wish to highlight a few areas of particular concern to bclMC.

### **General Comments**

While a comparison of the Autorité des marchés financiers (AMF) proposal and that put forward by the Canadian Securities Administrators (CSA), leads us to favour the CSA proposal, there are some high level concerns that bclMC would point out. Chief among them would be a serious consideration of whether sweeping change is even required to the shareholder rights plan landscape in Canada. bclMC is not convinced that major change is required, partly because we are concerned about Boards of Directors having too much discretion and further entrenching poorly performing management teams.

The AMF proposal in particular notes that attention to corporate governance has increased; however, our perspective is that many barriers to holding company directors accountable still exist in Canada. As securities regulators assess the responses to this consultation, bclMC encourages you to keep these barriers in mind, such as:

- The prominence of dual class share structures that potentially entrench management and directors with no ability of shareholders to remove them;
- A flawed and ineffective proxy voting system that does not provide any assurance to shareholders that their votes have been received and counted accurately (with many implications for voting on shareholder rights plans);
- The uneven application of rules governing shareholder rights plans is primarily a function of multiple securities regulators rather than a cohesive national securities regulator;
- A patchwork of legislation around business corporations acts that have different rights for shareholders in regards to submitting shareholder proposals that can be prohibitive; and
- A plurality voting standard under corporate law while majority voting policies remain voluntary, with the result being that ineffective directors are shielded from accountability.

bclMC points out these barriers in response to the question posed in the consultation paper asking if any other changes are required to securities legislation if either proposal were implemented. In order to be effective, some of the above issues require attention in conjunction with any changes to the poison pill landscape.

### **Defining the Problem**

It is the view of bclMC that the exact problem related to the status quo has not been accurately or well defined. Implicit in both the AMF and CSA proposals, are the assumptions that hostile bids are both widespread, leading to a 'bidder-friendly' atmosphere, and do not necessarily maximize shareholder value. bclMC finds both of these propositions to be not well supported by factual evidence.

In terms of being a bidder-friendly jurisdiction, we are unable to share this conclusion based on statistics from Bloomberg on the levels of recent hostile bid activity. Looking at the number of hostile bids outstanding as of June 2013, we found only six hostile acquisitions and two of those were terminated and one was still pending. This does not seem like an alarming number given the size of the Canadian market.

There is also a tendency to use the hollowing out of Canada argument in the absence of supporting facts. Again, using statistics from Bloomberg, we find most of the recent bids did not involve Canadian companies being potentially taken over by foreign companies (with the exception of RONA and Lowe's). Other examples we note include acquisitions by other *Canadian* firms such as:

- the TMX Group - acquired by Canadian banks and institutional investors after shareholders chose not to support a merger with the London Stock Exchange;
- First Quantum acquiring Inmet Mining;
- Resolute Forest Products acquiring Fibrek; and
- Bonterra acquiring Spartan Oil.

bcIMC has also reviewed Blakes' Canadian Hostile Bid Survey which assessed 52 unsolicited transactions between 2006 and 2010. This survey found that more than 50% of bid considerations were increased, and sometimes two or three times (see [http://www.blakesfiles.com/Reports/2011\\_Blakes\\_Hostile\\_Bid\\_Study\\_EN.pdf](http://www.blakesfiles.com/Reports/2011_Blakes_Hostile_Bid_Study_EN.pdf)).

### **Collective Action Problem**

bcIMC does share the CSA's concern around collective action. However, bcIMC does not feel that the solution is appropriately addressed in the CSA proposal. We do agree that the collective action problem is real and have experienced this ourselves in the face of a bid. The AMF proposal does provide a solution to this and we recommend that the CSA adopt that part of the AMF proposal that would require 50% of shareholders to tender to the bid, and once that threshold was reached, bids would have to remain open for an additional ten days. In the absence of a formal vote such as that provided in a friendly merger situation, this is the best substitute to gauge shareholder opinion on the merits of the bid.

### **Role of the Regulator**

Under both the CSA and AMF proposals, we are concerned about a decreased role for securities regulators but more so under the AMF proposal. In general, bcIMC feels that securities regulators have a specific mandate, not shared by the courts, to protect the interests of investors and we do not want to see that mandate or involvement weakened.

### **Unintended Consequences**

bcIMC is particularly concerned about discouraging the making of takeover bids which we would expect to happen under the AMF proposal as it provides the Board with excessive discretion. As pointed out earlier in this submission, there are several recent bids between Canadian companies where the post-acquisition companies are likely in a stronger financial position. This allows them

some level of protection from foreign takeovers with all of the benefits that entails. Regulators should ensure that we don't inadvertently deter acquisitions among Canadian companies.

bcIMC would like to thank you again for considering the comments provided and for extending the original comment period in order to give these proposals full consideration. Please feel free to contact Jennifer Coulson at [jennifer.coulson@bcimc.com](mailto:jennifer.coulson@bcimc.com) or Barb MacDonald [barb.macdonald@bcimc.com](mailto:barb.macdonald@bcimc.com) if you require any clarification on the above points.

Yours Truly,

**BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION**

A handwritten signature in black ink, appearing to read 'P. Flanagan', written in a cursive style.

Paul Flanagan  
Acting Chief Executive Officer and Chief Investment Officer